

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**Government of the District of Columbia  
Public Employee Relations Board**

In the Matter of:	)	
	)	
Fraternal Order of Police/Metropolitan Police Department Labor Committee,	)	PERB Case Nos. 06-U-24
	)	06-U-25
Complainant,	)	06-U-26
	)	06-U-28
v.	)	
	)	Opinion No. 904
District of Columbia Office of Police Complaints,	)	<b>Motion for Leave to File</b>
	)	<b>Interlocutory Appeal</b>
Respondent.	)	
	)	
	)	

**DECISION AND ORDER**

**I. Statement of the Case:**

In March 2006 the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP" or "Union") filed a series of unfair labor practice complaints against the District of Columbia Office of Police Complaints ("OPC" or "Respondent").<sup>1</sup> The unfair labor practice complaints allege similar misconduct by OPC and its staff during interviews of Metropolitan Police Department officers accompanied by Union representatives. In particular, FOP alleges that OPC interfered with Union members' rights by providing misleading information to the members and their representatives regarding the presence of and monitoring by additional OPC personnel during the interviews, as well as questioning officers outside the scope of the citizen complaints.

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<sup>1</sup>FOP's unfair labor practice complaints against the OPC and various individually-named officials at the OPC were filed on March 14, 2006, March 21, 2006, March 23, 2006, and two on March 24, 2006. These cases were designated as PERB Case Nos. 06-U-24, 06-U-25, 06-U-26, 06-U-27 and 06-U-28. On May 28, 2006, the Board's Executive Director dismissed one of the five unfair labor practice complaints, PERB Case No. 06-U-27, for failure to state a claim under the Comprehensive Merit Personnel Act ("CMPA"). Also, FOP filed a request for preliminary relief; but later withdrew that request.

The Board's Executive Director consolidated the cases, as all of the complaints involved common issues of fact and law, and appointed a Hearing Examiner. The administrative process continued with a pre-hearing conference in the consolidated matters on October 20, 2006. The parties raised several issues before the Hearing Examiner, including the Board's jurisdiction over the cases and the naming of OPC personnel in their individual capacities as respondents. Per the parties' joint request, a pre-hearing status conference was scheduled before the Hearing Examiner on February 5, 2007, and a hearing on jurisdiction and on the merits was scheduled to begin on March 6, 2007.<sup>2</sup> However, on December 29, 2006, OPC filed a "Complaint for Declaratory Relief" in the Superior Court of the District of Columbia challenging the Board's jurisdiction.<sup>3</sup> The Board filed a "Motion to Dismiss".

On March 6, 2007, the parties presented oral argument to the Hearing Examiner concerning the issue of whether the hearing should be stayed pending the resolution of the related litigation in the Superior Court. On March 30, 2007, Judge Jennifer Anderson granted the Board's Motion to Dismiss.<sup>4</sup> Subsequently, on April 30, 2007, the Hearing Examiner issued an order acknowledging that she had been advised of Judge Anderson's dismissal of OPC's "Complaint for Declaratory Relief." As a result, the Hearing Examiner's order noted that the "issue of whether this matter should be stayed is moot and that it is appropriate to proceed with the . . . hearing [scheduled for] **June 5 and June 6, 2007.**" (Hearing Examiner's Order dated April 30, 2007, emphasis in original.)

On May 30, 2007, OPC filed a "Motion for Leave to File an Interlocutory Appeal" requesting that the Board grant OPC leave to file an interlocutory appeal. In support of its motion, OPC argues that the Board "does not have jurisdiction to resolve the allegations presented in the unfair labor practice complaints filed by the [FOP] in the above-referenced matters. Consequently, [the Board] does not have authority to conduct an evidentiary hearing on the merits." (OPC's Motion at p. 1). In addition, OPC asserts that the Board's "Hearing Examiner abused judicial discretion by ordering that a hearing be conducted for concurrent presentation of jurisdictional and substantive evidence. Insisting on resolving the matter of jurisdiction only after a hearing on the merits violates simple notions of procedural equity, unfairly prejudice OPC and departs from the doctrine of judicial economy." (OPC's Motion at pgs. 1-2).

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<sup>2</sup>On March 12, 2007, FOP filed a document styled "Consent Withdrawal of Individually Named Respondents from the Complaints," stating that the parties consented to the voluntary dismissal of OPC personnel who were named in their individual capacity.

<sup>3</sup>OPC's filing was assigned Civil Action No. 9190-06.

<sup>4</sup>Judge Anderson's decision was issued from the bench and she did not issue a written decision. However, a review of the Superior Court docket reveals that this matter has been closed.

On June 6, 2007, FOP filed an opposition to OPC's request. OPC's submission and FOP's opposition are before the Board for disposition.

**II. Discussion:**

OPC disagrees with the Hearing Examiner's ruling that a hearing be conducted and believes that it should be allowed to file an interlocutory appeal concerning the Hearing Examiner's ruling.

Board Rule 554.1 provides as follows:

Unless expressly authorized by the Board, interlocutory appeals to the Board of rulings by the Executive Director, Hearing Examiner or other Board agents shall not be permitted. Exceptions to such rulings shall be considered by the Board when it examines the full record of the proceedings.

OPC asserts that in the present case, the Board should authorize the agency to file an interlocutory appeal because:

[The Board] does not have plenary jurisdiction. Under its authorizing statute, [the Board] does not have jurisdiction to determine matters of contract formation, interpretation or breach as related to collective bargaining agreements. Second, [the Board] does not have jurisdiction to determine the applicability of an arbitration clause contained in a collective bargaining agreement.

Third, [the Board] cannot apply the "alter ego" doctrine to determine that OPC is a party to a collective bargaining agreement because OPC is not a successor agency and is precluded by statute from ever being a successor agency. Further, to strain the alter ego doctrine in this fashion would, in effect, result in a finding that OPC was a party to the contract in contravention of the [Board] authorizing statute and [Board] precedent. Additionally, [the Board] cannot apply the doctrine of agency to this case as there is no evidence of an "intimate relationship" to allow [the Board] to find that OPC's actions could be attributed to MPD.

Fourth, [the Board] does not have jurisdiction to determine whether OPC interviewing protocols violate the CMPA since such a determination requires [the Board] to interpret statutes that [the Board] is not authorized to interpret under the CMPA.

The [Board's Hearing Examiner] violates simple notions of procedural equity, unfairly prejudices OPC and departs from the doctrine of judicial economy by failing to dismiss the ULP complaints for lack of jurisdiction and insisting that evidence on both jurisdiction and the merits of the ULP claims be presented in the same hearing.

\* \* \*

Neither D.C. Official Code §1-605.02 nor any other section in the Comprehensive Merit Personnel Act (CMPA) grants authority to [the Board] to determine such matters as contract formation, contract interpretation or breach of contract.

\* \* \*

Despite clear precedent disallowing characterization of contractual claims as unfair labor practice claims, virtually all of the FOP's ULP claims before [the Board] are predicated on alleged violations by OPC personnel of a collective bargaining agreement entered into by MPD and FOP. . . . Thus, facially, the ULP claims do not allege any basis for which the [Board] can assert jurisdiction over the matter. For this reason, [the Board] cannot order a hearing on the merits of the allegations. (OPC's Motion at pgs. 4-6.)

In view of the above, OPC is requesting that the Board grant its request for interlocutory appeal and dismiss the unfair labor practice complaints. (See OPC's Motion at p. 16).

FOP filed an opposition to OPC's motion. In their opposition, FOP states the following:

After over fourteen months and substantial resources invested by the Complainant, the Respondents, and the Board, the Respondent is yet again attempting at the 11<sup>th</sup> hour to short-circuit the administrative process and improperly and prematurely appeal the Hearing Officer's appropriate exercise of discretion in the conduct of the hearing. Significantly, the Respondent is requesting leave to appeal an Order entered by the Hearing Officer over seven months ago. The Respondent previously employed this tactic by filing a Complaint for Declaratory Relief with the D.C. Superior Court challenging the very same Hearing Officer decision that it once again disputes in this Motion. Shortly after filing the Complaint, the Respondent filed a Motion to Stay approximately one month before the scheduled March 5, 2007 hearing. The Motion to Stay was based solely upon the fact that the Respondent had filed the Complaint. The D.C. Superior Court dismissed the Respondent's Complaint, and the Hearing Officer

denied the Respondent's Motion to Stay. The Board should reject this third attempt at delay and deny the Respondent's Motion for Leave to File an Interlocutory Appeal.

The Respondent admitted in previous filing with the Board and with the D.C. Superior Court that the Board Rules preclude the very interlocutory appeal that it now requests leave to file.

\* \* \*

Despite its own admissions that it is not entitled to an interlocutory appeal, and the complete lack of extraordinary circumstances that necessitate an interlocutory appeal, the Respondent attempts to justify filing the Motion by grossly mischaracterizing the Board's prior statements.

\* \* \*

The Board has jurisdiction to hear the Unfair Labor Complaints and the Hearing Examiner properly exercised her authority by setting the hearing in this matter, and therefore, the Board should deny the Respondent's Motion for Leave to File and Interlocutory Appeal. (FOP's Opposition at pgs. 2, 3 and 6, emphasis in original).

We find that OPC's argument concerning the Board's jurisdiction raises no new arguments and is a repetition of the argument considered and rejected by the Hearing Examiner. Thus, we believe that the basis of OPC's Motion is its disagreement with the Hearing Examiner's decision: (1) not to bifurcate the proceeding by ruling on the question of jurisdiction before continuing with the evidentiary presentation of the underlying facts and legal issues and (2) to schedule a hearing. We have previously held that a "[d]isagreement with a Hearing Examiner ruling does not justify the Board taking the extraordinary step of allowing [a] request for interlocutory appeal." Vartan Zenian at al. v. AFSCME, Local 2743 and Department of Insurance and Securities and Banking, Slip Op. No. 832 at p. 5, PERB Case No. 04-U-30 (2006). See also, D.C. Water and Sewer Authority and AFSCME, Local 2091, et al., Slip Op. No. 751, PERB Case No. 03-UM-03 (2004). Furthermore, OPC's argument regarding the Board's jurisdiction raises mixed issues of fact and law that must be determined on a record, and cannot be determined on the pleadings. Therefore, we deny OPC's request for interlocutory appeal. However, we point out that once the Hearing Examiner issues her Report and Recommendation in this matter, all of the parties will have an opportunity to file exceptions to the Hearing Examiner's findings and to challenge this and any other ruling at the end of the proceeding.

For the reasons discussed, we deny OPC's Motion for Leave to File Interlocutory Appeal.

Decision and Order Concerning  
Motion for Leave to File Interlocutory appeal  
PERB Case Nos. 06-U-24, 06-U-25, 06-U-26 and 06-U-28  
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**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. The District of Columbia Office of Police Complaints' "Request for Leave to File an Interlocutory Appeal," is denied.
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC RELATIONS BOARD**  
**Washington, D.C.**

June 19, 2007

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case Nos. 06-U-24, 06-U-25, 06-U-26 and 06-U-28 was transmitted via Fax and U.S. Mail to the following parties on this the 19<sup>th</sup> day of June 2007.

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Certificate of Service

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